

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

ALFRED VALENTINO GARCIA,

Plaintiff,

v.

Case No. 6:09-CV-01103 LH/LFG

STATE OF NEW MEXICO, GOVERNOR BILL  
RICHARDSON, NEW MEXICO CORRECTIONS  
DEPARTMENT, JOE WILLIAMS, and  
unidentified Corrections Department personnel and  
contractors,

Defendants.

**REPLY IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Defendants State of New Mexico and Governor Bill Richardson have asked this Court to dismiss them as defendants in this case because (1) Governor Richardson is entitled to qualified immunity, (2) the State of New Mexico cannot be sued for money damages directly under § 1983, and (3) Garcia failed to articulate a state tort claim against the State of New Mexico or Governor Richardson that falls within an exception to the immunity the state and state officials enjoy under the New Mexico Tort Claims Act. [Doc. 7 filed 11/23/2009.] In responding to the motion, Garcia points to allegations in a proposed amended complaint he has filed that suggest the Governor can be sued here on a theory of vicarious liability. Garcia's response otherwise is based on arguments that the Governor somehow can be held liable because he removed this case to federal court and filed a motion to dismiss. Beyond this, Garcia tries to avoid dismissal by including allegations in his proposed amended complaint about the steps he contends he took to exhaust his administrative remedies with the Department of Corrections, and providing some

additional description of Department of Corrections employees allegedly taking property from him and not returning it.

Neither his response brief nor his proposed amended complaint respond to the arguments the State of New Mexico and Governor Richardson have offered in support of dismissing them from this case. Governor Richardson is entitled to qualified immunity because the original complaint and proposed amended complaint do not satisfy the requirements of *Ashcroft v. Iqbal*, 127 S. Ct. 1937 (2009), and Garcia has not identified a clearly established constitutional right that Governor Richardson personally participated in violating. *See Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Liability under § 1983 simply cannot be grounded on vicarious liability, and proper litigation decisions such as removing the case to federal court and filing a Rule 12 motion obviously are irrelevant to whether a plaintiff can state a constitutional claim.

Moreover, Garcia has not explained how any § 1983 claim he might be trying to pursue against the State of New Mexico directly can be squared with the well-settled principle that a claim for money damages under § 1983 must be brought against an appropriate state official in his or her individual capacity. *See, e.g., Stidham v. Peace Office Stds & Training*, 265 F.3d 1144, 1156 (10th Cir. 2001). And finally, neither the original complaint nor the proposed amended complaint state a claim under state tort law that falls outside the immunity the New Mexico Tort Claims Act provides. *See* NMSA 1978, § 41-4-4.

For all of these reasons and the reasons set forth in the State of New Mexico's and Governor Bill Richardson's motion to dismiss, these parties ask that they be dismissed from this action.

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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of January, 2010, I filed the foregoing **Reply in Support of Defendants' Motion to Dismiss for Failure to State a Claim** electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic filing.

Peter A. Robertson,  
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I FURTHER CERTIFY that I mailed a copy, first class mail, postage prepaid addressed as follows:

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/s/ Little V. West, filed electronically  
LITTLE V. WEST